Clean Water Restoration Act (CWRA)
H.R. 2421

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On behalf of Clean Water Action, I am pleased to offer our comments on the Clean Water Restoration Act. I am the Program Coordinator for Clean Water Action Alliance in Minneapolis, Minnesota where I work on water and energy issues. Clean Water Action Alliance, a state chapter of Clean Water Action with 60,000 members in Minnesota, is working to ensure that we have clean and safe water now and for generations to come. Clean Water Action, with over one million members nationwide, is a national organization working for clean, safe and affordable water, prevention of health-threatening pollution, creation of environmentally safe jobs and businesses, and empowerment of people to make democracy work. Clean Water Action organizes strong grassroots groups, coalitions and campaigns to protect people's environment, health, economic well-being and community quality of life.

The Clean Water Restoration Act has been a priority issue for Clean Water Action's grassroots policy and mobilization campaigns since its first introduction in early 2004. Clean Water Action's policy and organizing staff nationwide have focused considerable effort on understanding recent federal policy threats to Clean Water Act protections and on mobilizing our members and other organizations and individuals to seek constructive solutions.

Today's hearing is important because the stakes couldn't be higher for the Clean Water Act. Historically, the Clean Water Act (Act) has protected the nation's lakes, rivers, streams and wetlands from pollution and destruction. Today, many water bodies are being denied the Act's protections. Polluters argue that Supreme Court decisions from 2001 and 2006 mean that the law's safeguards are only available for "navigable" water bodies (or for waters that have significant linkages to such water bodies). They claim the Act no longer protects numerous wetlands, streams, rivers, lakes and other waters that were historically covered.

Clean Water Action believes that recent Federal agency policy threatens to undermine the fundamental goals of the Act. At issue is the definition of "water of the United States," a definition which lays out the scope of many of the Act's provisions. In this testimony we will discuss: the importance of clean water to the nation's health and prosperity, especially the importance of the tributaries and wetlands currently at greatest risk of pollution and destruction from loss of Clean Water Act jurisdiction; the historic, broad scope of the 1972 Clean Water Act; the implications of the *SWANCC* and *Rapanos* decisions and the Environmental Protection Agency (EPA) and U.S. Army Corps of Engineers (Corps) policy guidance issued in the wake of those cases; the need

for a Congressional response and finally, why the Clean Water Restoration Act (CWRA) is the best and most appropriate action for Congress to take to keep the Clean Water Act's promise of clean and healthy water.

We trust this testimony and the information it provides will be helpful to the Committee in its deliberations on this issue. Your work is vital to the health of our communities today and for future generations. Thank you for the opportunity to provide our comments to this committee.

Background

Our contention is that current EPA and Corps implementation of the Clean Water Act undermines the intent of the Act and threatens the health of our nation's water. Events since a Supreme Court ruling in 2001 have resulted in a policy situation that necessitates corrective action by Congress.

The Supreme Court held in *Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers*, 531 U.S. 159 (2001) (*SWANCC*) that non-navigable, intrastate, "isolated" waters could not be classified as "waters of the United States" based solely on the government's so-called "Migratory Bird Rule," which protected aquatic habitat used by migrating birds. The Court made this ruling despite legislative history and intent and Supreme Court precedent in *Riverside Bayview*, *Oulette* and numerous lower court cases broadly interpreting the jurisdictional scope of the law.

Comment [DLG1]: Need references

The holding in *SWANNC* placed restrictions on the waters covered by the Clean Water Act but focused narrowly, only addressing the use of a single rule for determining jurisdiction. However, the opinion prompted additional broader attacks on protection of non-navigable waters. Some were through the courts[1] but the most insidious attacks were by the EPA and Corps.

Advanced Notice of Proposed Rulemaking and Guidance

On January 15, 2003, the EPA and the Corps published an Advance Notice of Proposed Rulemaking (ANPRM) raising questions about the jurisdiction of the Clean Water Act. Simultaneously, they released a guidance memo to their field staff regarding Clean Water Act jurisdiction over certain so-called "isolated," non-navigable, intrastate waters (the term "isolated" waters appears nowhere in the Clean Water Act itself, but was a term used by the Court in *SWANCC*). The agencies claimed these actions were necessary because of the *SWANCC* case, but both the guidance memo and the ANPRM went far beyond the Court's holding.

The Guidance took effect right away and had an immediate impact on many of the nation's wetlands, creeks, ponds, and streams. It told the Corps and EPA staff to stop asserting jurisdiction over so-called "isolated" waters without first obtaining

[1] In the wake of *SWANCC*, the courts generally did not follow the worst implications of the decision, though it still did lead to a cut back on legal protections. See, e.g., *U.S. v. Rapanos*, 376 U.S. 629, 638 (6th Cir. 2004) ("the majority of courts have interpreted *SWANCC* narrowly to hold that while the CWA does not reach isolated waters having no connection with navigable waters, it does reach inland waters that share a hydrological connection with navigable waters.").

permission from Headquarters.[2] No similar instructions were issued to get permission before allowing unregulated pollution or destruction of these waters. The EPA itself estimated that as many as 20 million acres of wetlands – 20 percent of the remaining wetlands in the continental U.S. – were "isolated," meaning they were placed at risk of losing federal Clean Water Act protections under the 2003 policy.[3]

The ANPRM announced the Administration's intention to consider even broader changes to Clean Water Act coverage through rulemaking. Specifically, the notice questioned whether there is *any* basis for asserting Clean Water Act jurisdiction over any so-called "isolated" water, even those used in or affecting interstate commerce. Fortunately, overwhelming opposition to the proposed rulemaking from Congress (including 218 members of the House); state water pollution control agencies; fish and wildlife agencies; natural resources agencies; hunting and angling groups; environmental organizations; and the public (over 130,000 individual citizens submitted comments, overwhelmingly in the negative) caused then-EPA Administrator Michael Leavitt to announce that the Administration would drop the rulemaking.[4]

The damaging ANPRM was withdrawn, but the EPA did not withdraw the Guidance. Left in place is its one-way policy requiring staff to call for permission to protect waters but not requiring permission to choose not to protect waters, allowing them to be polluted or destroyed. Using data provided by the agencies, it is estimated that the Corps are making well over 1,000 *SWANCC*-related "no jurisdiction" determinations a year. In contrast, in the 4 years since the 2003 policy was adopted, fewer than 20 cases were elevated to EPA or Corps headquarters by field staff seeking to assert jurisdiction over disputed waters. In an August 2004 report based upon Corps records, Earthjustice, National Wildlife Federation, Natural Resources Defense Council and Sierra Club found numerous examples of the Corps using the *SWANCC* decision and the 2003 Guidance to decline jurisdiction over waters that were clearly previously covered by the Clean Water Act. Those waters the Clean Water Act was found to not cover include an 86-acre lake, a 150-mile-long river, a 4,000-acre tract of wetlands and a 70-mile-long canal – leaving these waters and many others vulnerable.[5]

Comment [A2]: Need citation

To add to the opposition to the 2003 Guidance, on May 18, 2006, the U.S. House of Representatives voted 222-198 to approve an amendment that would block the use of Federal funds to implement the contested policy. The Senate, however, passed no EPA-Interior appropriations bill in 2006, so the House amendment did not become law. Unfortunately, the EPA and Corps continue to follow this policy – despite the

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[2] 68 Fed. Reg. 1995, 1997-98 (Jan. 15, 2003) ("field staff should seek formal project-specific HQ approval prior to asserting jurisdiction over waters based on other factors listed in 33 CFR 328.3(a)(3)(i)–(iii)").

[3] *See* Eric Pianin, *Administration Establishes New Wetlands Guidelines; 20 Million Acres Could Lose Protected Status, Groups Say*, Washington Post, at A5 (Jan. 11, 2003) ("The new regulation would shift responsibility from the federal government to the states for protecting as much as 20 percent of the 100 million acres of wetlands in the Lower 48 states, according to official estimates.").

[4] *See* Stevens, J., Dissenting Opinion, Slip Op. at 10 n.4 (describing agencies' effort to revise regulations and noting that "almost all of the 43 States to submit comments opposed any significant narrowing of the Corps' jurisdiction – as did roughly 99% of the 133,000 other comment submitters").

[5] *See* Earthjustice, NWF, NRDC, and Sierra Club, *Reckless Abandon: How the Bush Administration is Exposing America's Waters to Harm*, Aug. 2004.

overwhelming, bipartisan opposition to it and despite the harm that it has already caused.

The Rapanos Decision and Its Three Major Opinions

In the wake of *SWANCC*, the lower courts largely rejected the claims of those opposed to Clean Water Act protections. However, in October 2005 opponents were able to convince the Supreme Court to take up two other cases – *Rapanos v. U.S.*, and *Carabell v. U.S. Army Corps of Engineers* – that together questioned the extent to which the law protects non-navigable tributaries and their adjacent wetlands.

Comment [A3]: Need citation if possible NOT Found

In the *Rapanos* and *Carabell* cases, the Bush Administration argued that the Clean Water Act and its implementing regulations properly encompass and protect both tributaries of "traditionally navigable" waters and the wetlands adjacent to these streams and rivers. This position was supported by briefs filed by more than 30 State Attorneys General and nine members of Congress who helped pass the Clean Water Act in 1972, its amendments in 1977, or both. Also filing supporting briefs were: four former EPA administrators who served under Republican and Democratic administrations; a coalition of hunting and angling groups and businesses; state water pollution control officials, wetland managers, fish and wildlife agencies, and floodplain managers; New York City; numerous western resources councils; Macomb County (MI) and many environmental, public health and conservation groups.

The *Rapanos* petitioners and some supporting organizations argued that the Clean Water Act does not protect non-navigable tributaries and only covers those wetlands directly adjacent to traditionally navigable waters.[6] In its decision (which addressed the *Rapanos* and *Carabell* as consolidated cases), the Supreme Court had no majority opinion but split 4-1-4 in its analysis of the Clean Water Act and the extent to which the law covers tributaries and wetlands.[7] Consequently, the Court did not invalidate the agency's existing rules, and the various opinions suggested three different tests for determining whether streams and other tributaries and wetlands adjacent to those waters remain under the scope of the Clean Water Act.

The four-justice plurality, in an opinion written by Justice Scalia, significantly limits the law's scope. Focusing on a 1954 dictionary definition of "waters" more than the language, purpose, or history of the Clean Water Act (a law they characterize as "tedious"), Justice Scalia, joined by Chief Justice Roberts and Justices Thomas and Alito, concluded that:

> "[T]he phrase 'the waters of the United States' includes only those relatively permanent, standing or continuously flowing bodies of water 'forming geographic features' that are described in ordinary parlance as 'streams[,] ... oceans, rivers, [and] lakes.' "[8]

[6] The petitioners in the *Carabell* advanced a more limited argument, claiming that it was impermissible for the Corps to regulate a wetland as "adjacent" to a protected water body – and therefore subject to the CWA – if it lacked a hydrological connection with the water body. Brief of Petitioners, *Carabell v. U.S. Army Corps of Eng'rs*, at 12-13 (Dec. 2, 2005).
[7] *Rapanos v. U.S.*, 126 S.Ct. 2208 (2006).
[8] *Id.* at 2225 (plurality opinion).

The opinion also required that wetlands have a "continuous surface connection" to such waters in order to receive protection.[9] The opinion even seemed to indicate that the plurality might believe that water bodies must be interstate (or connected to interstate waters) in order to be "waters of the United States."[10]

Justice Kennedy, in a separate concurring opinion, would require the agencies to show a physical, biological or chemical linkage – a "significant nexus" – between a water body and a navigable body to protect it.[11] For tributaries, Justice Kennedy says that, applied consistently, existing rules "may well provide a reasonable measure of whether specific minor tributaries bear a significant nexus with other regulated waters to constitute 'navigable waters' under the Act."[12] For wetlands adjacent to non-navigable tributaries, Justice Kennedy suggested that are different ways to show a "significant nexus", depending on the kind of water to which the wetland is adjacent.[13]

While he concurred that the *Rapanos* and *Carabell* cases should be remanded, Justice Kennedy completely rejects Justice Scalia's reasoning. Indeed, he stated that Justice Scalia's plurality opinion "is inconsistent with the Act's text, structure, and purpose."[14]

In dissent, Justice Stevens, joined by Justices Souter, Ginsburg and Breyer, wrote that the existing agency regulations reflect a reasonable interpretation of the statutory phrase "waters of the United States," especially in light of the Court's unanimous 1985 decision in *US v. Riverside Bayview Homes*, which upheld the application of these very same rules.[15] In rejecting the rationale of both of the other opinions, these four dissenting justices stated that the sum of Justice Scalia's test and Justice Kennedy's test is the protection of all waters previously covered by agency regulations.[16] In other words, the agencies should continue to protect the streams and wetlands as before. An important point, too, is that although Justice Scalia and Kennedy's tests may well permit the law to reach many of the same waters the Clean Water Act historically protected, the practical effect is to make numerous jurisdictional questions subject to a vague case-specific analysis.[17]

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[9] *Id.* at 2226.
[10] *Id.* at 2220 n.3 (stating that the phrase "of the United States" traditionally "excludes intrastate waters, whether navigable or not" and suggesting that the CWA's use of the phrase "retains some of its traditional meaning").
[11] *Id.* at 2248 (Kennedy, J., concurring).
[12] *Id.* at 2249.
[13] *Id.* ("When the Corps seeks to regulate wetlands adjacent to navigable-in-fact waters, it may rely on adjacency to establish its jurisdiction. Absent more specific regulations, however, the Corps must establish a significant nexus on a case-by-case basis when it seeks to regulate wetlands based on adjacency to nonnavigable tributaries.").
[14] *Id.* at 2246.
[15] *Id.* at 2255.
[16] *Id.* at 2265 & n. 14.
[17] *id.* at 2250 (Kennedy, J., concurring) ("[T]he end result in these cases and many others to be considered by the Corps may be the same as that suggested by the dissent, namely, that the Corps' assertion of jurisdiction is valid. Given, however, that neither the agency nor the reviewing courts properly considered the [significant nexus] issue, a remand is appropriate, in my view, for application of the controlling legal standard.").

The Aftermath of Rapanos

What water bodies remain protected after *Rapanos*? That is unclear. For instance, one can make a case for retaining strong Clean Water Act protections for tributary streams and their adjacent wetlands because there is no five-Justice majority rationale in *Rapanos* for restricting jurisdiction over wetlands adjacent to non-navigable tributaries;[18] indeed no specific water was determined to be non-jurisdictional in *Rapanos*. Likewise, as noted above, the Court's holding in *SWANCC* was ultimately a narrow one that permits the agencies to protect geographically "isolated" water bodies. Consistent with these principles, an interpretation could be that the agencies charged with implementing the law continue to protect the Nation's water bodies identified in their regulations. They would also provide meaningful guidance for their field staff and the public, showing how to develop facts to help support jurisdictional determinations (i.e., relationship to interstate commerce for "isolated" waters and "significant nexus" or "continuous surface connection" for wetlands adjacent to non-navigable tributaries).

However, there are strong indications from the past year that this protective view of *Rapanos* will not carry the day. Rather, as discussed below, there have been a number of interpretations of the decision and its conflicting opinions, with the net result being that confusion still reigns.

Many Cases, Many Approaches to deciphering *Rapanos*

The first court decision dealing with *Rapanos* following the Supreme Court's decision is an example of the problems messy and vague opinions can unleash. The case, *United States v. Chevron Pipeline Company,*[19] involved a spill of approximately 126,000 gallons of crude oil from a corroded Chevron pipeline that flowed into an unnamed tributary and an intermittent stream near Snyder, Texas.[20] Chevron contended that there was no flowing water in the Creek or its tributary when the spill and the company's initial cleanup actions occurred. The Justice Department argued that this did not mean that the Clean Water Act did not protect the stream.[21] The government argued that, during times that there was flow in the Creek, there was an unbroken connection from the stream to Rough Creek and then to the Double Mountain Fork of the Brazos River.[22]

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[18] As discussed further below, EPA and the Corps, among others, have interpreted the *Rapanos* opinion to place limitations on non-navigable tributaries themselves, as opposed to limiting the decision to the wetlands adjacent to non-navigable tributaries. We believe this is in error. Justice Kennedy indicated that the Corps could properly assert categorical jurisdiction over tributaries by applying its regulations consistently. 126 S. Ct. at 2249 (noting that the Corps asserted jurisdiction over tributaries having an "ordinary high water mark" under § 328.3(e), Justice Kennedy concluded: "Assuming [this standard] is subject to reasonably consistent application, it may well provide a reasonable measure of whether specific minor tributaries bear a sufficient nexus with other regulated waters to constitute 'navigable waters' under the Act."). Indeed, both *Rapanos* and *SWANCC* involved water bodies in categories other than tributaries ("other waters" and "[w]etlands adjacent to waters," respectively).

[19] 437 F.Supp.2d 605 (N.D. Tex., 2006),

[20] The case is also discussed in more detail in a later section.

[21] Brief of the U.S. at 2-3.

[22] Id. at 11.

In its decision, the court notes that there is no majority opinion in *Rapanos*, and in trying to make sense of the Supreme Court's decision, found that Justice Kennedy's "significant nexus" test was not sufficiently clear to follow as a guide to the lower courts.[23] The court therefore chose to rely on the Scalia plurality opinion to support its conclusion that the U.S. could not impose fines on Chevron for spilling crude oil into the tributary and creek because they were not "waters of the United States."[24]

Additional lower court cases favorably citing the Scalia plurality may well follow, in view of the fact that litigants have argued that it should be the governing test.[25] This makes little sense; five Justices explicitly rejected the plurality opinion, and Justice Kennedy noted that it "makes little practical sense" and "is inconsistent with the Act's text, structure, and purpose."[26]

Other lower courts have followed different paths. Some lower courts have determined that Justice Kennedy's "significant nexus" test is now the controlling legal opinion, despite the fact that he alone embraced the "significant nexus" approach as the Clean Water Act test for jurisdiction.[27] Still others have determined that if either the Scalia "relatively permanent flow" or the Kennedy "significant nexus" test are met, the disputed waterbody will remain under Clean Water Act jurisdiction.[28]

The confusion shown in courts trying to divine the meaning and significance of the *Rapanos* 4-1-4 split is strong evidence in itself that long-settled case law and expectations under the Clean Water Act have been up-ended by the Supreme Court. Even after the *SWANCC* decision, the lower courts were fairly uniform in their interpretation of the precedent set by that case.[29] Now, in the post-*Rapanos* world, it seems clear already that the lower courts are likely to be much more divergent in their opinions on what water bodies the Clean Water Act should now protect or not protect.

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[23] *See* 437 F.Supp.2d at 612-15 (saying "[b]ecause Justice Kennedy failed to elaborate on the 'significant nexus' required, this Court will look to the prior reasoning in this circuit,")

[24] *Id.* (noting similarity of receiving water to a kind of water body discussed in plurality opinion and saying "the United States failed to direct the Court to evidence showing whether any oil from the spill actually reached 'the navigable waters of the United States' – as that term is defined in [prior circuit precedent] or in the Supreme Court's plurality opinion in *Rapanos*.").

[25] *See, e.g.*, Brief Amicus Curiae of Pacific Legal Foundation, National Federation of Independent Business Legal Foundation, and Building Industry Association of Washington in Support of Plaintiffs, *American Petroleum Inst. v. Johnson*, No. 1:02CV02247, at 9-13 (Mar. 1, 2007).

[26] 126 S.Ct. at 2242 & 2246.

[27] *See, e.g., Northern California River Watch v. City of Healdsburg*, 457 F.3d 1023, 1029 (9th Cir. 2006) ("Justice Kennedy … provides the controlling rule of law"); *United States v. Gerke*, 464 F.3d 723, 724 (7th Cir. 2006) ("in *Rapanos*, [the narrowest ground] is Justice Kennedy's ground"); *Environmental Protection Information Ctr. v. Pacific Lumber Co.*, No. C 01-2821 MHP (N.D. Ca. January 8, 2007) (following *Healdsburg*); *United States v. Pozsgai*, No. 88-6546, at 3 (E.D. Pa. 2007) ("[f]or purposes of this litigation, I will apply Justice Kennedy's test").

[28] See, e.g. *United States v. Johnson*, 467 F.3d 56, 66 (1st Cir. 2006) (jurisdiction appropriate under "either the plurality's or Justice Kennedy's standard"); *Simsbury-Avon Preservation Soc'y, LLC v. Metacon Gun Club, Inc.*, 472 F.Supp.2d 219 (D. Conn. 2007) (evaluating citizen suit under both plurality and Justice Kennedy standards); *U.S. v. Evans*, 2006 WL 2221679, 19 (M.D. Fla., Aug. 2, 2006) ("this Court will consider the jurisdictional requirement for 'waters of the United States' to be met if the affidavits satisfy either the plurality's test . . . or the general parameters of Justice Kennedy's concurrence").

[29] See *U.S. v. Rapanos*, 376 U.S. 629, 638 (6th Cir. 2004) ("the majority of courts have interpreted *SWANCC* narrowly to hold that while the CWA does not reach isolated waters having no connection with navigable waters, it does reach inland waters that share a hydrological connection with navigable waters.").

New Guidance from EPA and the Corps Makes Things Worse

Last year, the EPA and Corps issued another policy "guidance" – this one interpreting the *Rapanos* decision – that threatens to accelerate the speed at which the nation's water quality programs are going in reverse.[30] This new policy will leave many waters without the clear, categorical Clean Water Act protections from pollution and destruction that have safeguarded them for the last three decades. Instead of categorically protecting many streams and wetlands the new policy will leave continued Clean Water Act coverage of these waters to an unworkable, speculative, case-by-case analysis by the EPA and Corps.

Briefly stated, the Guidance says that field staff generally should exercise jurisdiction over water bodies that either the *Rapanos* plurality or Justice Kennedy would cover, as the dissent in *Rapanos* advocated.[31] That summary belies the complexity and vagueness that pervade the rest of the documents in the Guidance. Close examination of the Guidance reveals that when the agencies made interpretive decisions about how to apply the *Rapanos* tests, they frequently erred on the side of being less protective of clean water than called for in the *Rapanos* plurality. Specifically, the policy:

- Leaves in place the 2003 EPA/Corps policy that significantly undermined protections for water bodies that are geographically "isolated" and other intrastate waters.[32,33] This means that the various new tests for Clean Water Act jurisdiction under the *Rapanos* decision – the "relatively permanently flowing" test and the "significant nexus test" – will be piled on top of the "isolated waters" test from the 2003 policy creating a tangled, snarled mess out of the law.[34]

- Significantly restricts the ability – when implementing the "significant nexus" standard – to protect waters by demonstrating the collective importance of waters "similarly situated" over a large, regional scale.[35] Thus, the agencies can only consider each headwater stream segment and its associated

[30] U.S. EPA & U.S. Army Corps of Eng'rs, Clean Water Act Jurisdiction Following the U.S. Supreme Court's Decision in Rapanos v. United States & Carabell v. United States (June 5, 2007).
[31] *Id.* at 3.
[32] *Id.* at 4 n. 18.
[33] As noted above, that 2003 policy was strongly repudiated by the U.S. House of Representatives in a bipartisan vote.
[34] On a related point, even though Justice Kennedy explained that the absence of a hydrological connection between a wetland and a covered water body may provide a "significant nexus" between the two, *see* 126 S.Ct. at 2251 (Kennedy, J., concurring) ("Given the role wetlands play in pollutant filtering, flood control, and runoff storage, it may well be the absence of hydrologic connection (in the sense of interchange of waters) that shows the wetlands' significance for the aquatic system."), the new policy suggests that staff cannot demonstrate jurisdiction over so-called "isolated" waters by demonstrating a "significant nexus."
[35] In the course of explaining why it is reasonable to afford Clean Water Act protection to wetlands, for instance, Justice Kennedy gave an example of how small waters in the upper Mississippi watershed contribute nutrient pollution that creates an enormous "dead zone" in the Gulf of Mexico. 126 S.Ct. at 2246-47. In contrast, the "guidance" only allows agencies to consider the collective impacts for wetlands next to just one tributary, defined as one particular order of a stream.

wetlands in isolation – ignoring the very significant combined impact of all headwater streams and associated wetlands in the "region" on the rivers or lakes downstream.[36] This will make it vastly more difficult to protect many small streams with intermittent or ephemeral flow and their associated wetlands under the Clean Water Act.

- Imposes new jurisdictional hurdles for the protection of tributary streams, despite the fact that the cases at issue in *Rapanos* involved the application of the rules governing adjacent wetlands, not the streams themselves.[37]

- Creates extreme uncertainty about how to implement the "significant nexus" standard in practice. It does so by laying out a series of factors that to consider, without providing any roadmap as to how to evaluate these factors. For instance, although it says, "[p]rincipal considerations when evaluating significant nexus include the volume, duration, and frequency of the flow of water in the tributary and the proximity of the tributary to a traditional navigable water," it also instructs field personnel to look at a range of ecologic factors. The policy does not say how staff should balance these considerations if they point in different directions.[38,39]

- Says that jurisdictional determinations for tributaries should focus on the characteristics (flow, etc.) of a stream at its "farthest downstream limit," apparently without regard to whether other portions of the stream might have conditions more supportive of jurisdiction under the various announced tests.[40]

- Announces, and then partially retracts, a presumption that certain kinds of geographic features are not "waters of the United States," without providing useful guidance on how to tell the difference between protected features and those that are not.[41]

The "case-by-case" analysis embodied in the new policy no longer guarantees protections for many streams and rivers that do not flow all year long – streams and

[36] *Id.* at 9.
[37] *Id.* at 1.
[38] *Id.* at 9-10.
[39] The Corps also issued an "Instructional Guidebook" to accompany the policy, and the guidebook contains a number of photos to illustrate the kinds of waters that the "guidance" might affect. Interestingly, although the guidebook has 11 photos of non-relatively permanent waters that flow into traditionally navigable waters, and thus would be jurisdictional under the "guidance" only if a "significant nexus" could be shown, the Corps does not indicate which, if any, of these water bodies is jurisdictional. Indeed, as best we can determine, the agencies did not include – anywhere in the myriad "guidance" materials released in June – any single example of a water body that the agency believes is connected by a "significant nexus" to a traditionally navigable water.
[40] *Id.* at 5 n. 21.
[41] *Compare id.* at 11 ("Swales or erosional features (e.g., gullies, small washes characterized by low volume, infrequent, or short duration flow) are generally not waters of the United States because they are not tributaries or they do not have a significant nexus to downstream traditional navigable waters.") *with id.* ("Certain ephemeral waters in the arid west are distinguishable from the geographic features described above where such ephemeral waters are tributaries and they have a significant nexus to downstream traditional navigable waters.").

rivers that the Clean Water Act had previously protected for some time. The required case-by-case review will effectively eliminate protections for some streams and rivers, even though the Supreme Court did not strike down existing agency regulations that protect these tributaries.

If past is prologue, these jurisdictional challenges will likely be resolved haphazardly and in many cases incoherently in the EPA Regions, the 38 Corps districts, and then in the courts, further muddying the legal waters regarding the scope of "waters of the United States."[42]

Nevertheless, those waters are important

The Court, EPA and Corps have removed Clean Water Act protections from a wide array of waters. The question, then, is whether or not this matters and whether or not this threatens the stated goal of the Clean Water Act to"restore and maintain the chemical, physical, and biological integrity of the Nation's waters".

The question of the correct scope of Clean Water Act protections is not a trivial one. Water is one of our most precious national assets. As a recent EPA draft report on the state of the environment observes:

> *"The nation's water resources have immeasurable value. These resources encompass lakes, streams, ground water, coastal waters, wetlands, and other waters; their associated ecosystems; and the human uses they support (e.g., drinking water, recreation, and fish consumption). The extent of water resources (their amount and distribution) and their condition (physical, chemical, and biological attributes) are critical to ecosystems, human uses, and the overall function and sustainability of the hydrologic cycle."*[43]

When Congress passed the Federal Clean Water Act Amendments of 1972, it broadly defined the water resources to protect, recognizing that "[w]ater moves in hydrologic cycles and it is essential that discharge of pollutants be controlled *at the source*").[44] This was a wise and elegant marriage of science and law; because all water bodies serve important functions in the natural environment and are part of an overall hydrologic system, the scope of the law had to be as broad in order to be effective.

As scientists have overwhelmingly documented, small streams and wetlands perform essential roles in our environment, storing floodwater, removing and processing pollutants that would contaminate downstream waters and providing critical habitat for many species of fish and other aquatic life. Safeguarding these waters from pollution is fundamentally important to keeping drinking water sources clean and minimizing flood risks in our communities.

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[42] *See* Government Accountability Office, *Waters and Wetlands: Corps of Engineers Needs to Better Support its Decisions for Not Asserting Jurisdiction*, GAO-05-870, Sept. 2005; *see also Reckless Abandon*, *supra*.
[43] U.S. EPA, EPA's 2007 Report on the Environment: Science Report, External Review Draft, at p. 3-6 (May 2007).
[44] S. Rep. No. 92-414, p. 77 (1972)

The February 2007 issue of *Journal of the American Water Resources Association* enlisted experts on America's waterways to discuss what role headwaters play in the overall status and safety of the nation's water supply by maintaining the physical, chemical and biological integrity of downstream waters. An article summarizing the collection observes:

> "[S]cientific evidence does not support the existence of a bright line separating headwater streams from downstream waters within these integrated hydrological systems. Via hydrological connectivity, headwater, intermittent and ephemeral streams cumulatively contribute to the functional integrity of downstream waters; hydrologically and ecologically, they are a part of the tributary system."[45]

Similarly, the September 2003 issue of the *Journal of the Society of Wetlands Scientists* contained numerous studies documenting the functions performed and values provided by wetlands, including so-called "isolated" wetlands. One article predicted the extent of isolated wetlands in 72 study areas based on a U.S. Fish and Wildlife Service (FWS) survey. The study sites included areas where specific types of "isolated" wetlands were known to occur (including Prairie Pothole marshes, playas, Rainwater Basin marshes and meadows, terminal basins, sinkhole wetlands, Carolina bays, and West Coast vernal pools). The study found that isolated wetlands constituted a significant proportion of the wetlands resource across the country: eight study areas had more than half of their wetland area designated as isolated, while 24 other areas had 20-50 percent of their wetland area in this category.[46] These wetlands perform many of the same important functions as wetlands that are not considered geographically "isolated" from other waters. Making a distinction between "isolated" and non-isolated wetlands for the regulatory purposes of protecting water quality does not make scientific sense.

In another example, EPA studies have drawn the connection between upstream wetlands and headwaters in the Chesapeake Bay watershed and the physical, chemical and biological integrity of the Chesapeake Bay and its navigable tributaries downstream. EPA Region III studies encompassing the Chesapeake Bay watershed show that headwater streams (first and second order streams) comprise about half of the many streams in the Bay watershed, and about half of these headwater streams flow intermittently at times.[47] EPA Region III studies show that about 36% of the area's remaining wetlands are associated with headwaters. Therefore, the watershed's non-navigable streams and adjacent wetlands comprise a large percentage of the watershed's hydrologic system.

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[45] Tracie-Lynn Nadeau and Mark Cable Rains, *Hydrological Connectivity Between Headwater Streams and Downstream Waters: How Science Can Inform Policy*, Journal of the American Water Resources Association, 118, 129 (Feb. 2007).

[46] *Geographically Isolated Wetlands of the United States*, Ralph W. Tiner (Sept. 2003) 23(3).

[47] *Consolidated EPA Region III Response to the Advanced Notice of Proposed Rulemaking on the Clean Water Act Regulatory Definition of "waters of the United States"* at 10, Appendix E at 3 (2003).

Similarly, EPA Region III compiled studies within the Bay watershed demonstrating that many of these remaining wetlands remove up to 90% of nitrogen and phosphorus pollution from runoff.[48] Nitrogen and phosphorus pollution cause eutrophication, the most significant threat to Chesapeake Bay watershed restoration.[49]

Nationwide, smaller streams are a significant percentage of the nation's overall hydrologic system. According to EPA, first-order streams comprise 53 percent of total stream miles, and intermittent (including ephemeral) streams comprise 59 percent of the total.[50] Over 100 million Americans get their drinking water from public water systems that intake water reliant, in some part, upon these streams; in 27 states, more than 1 million residents get drinking water impacted by these streams.[51] These headwater and intermittent streams also are utilized as discharge points for wastewater for over 14,000 industrial and municipal facilities with individual NPDES permits under the Clean Water Act.[52] If federal anti-pollution safeguards for these streams are significantly constricted, pollution could jeopardize public health as well as the physical, chemical and biological integrity of these waters.

Legislative History Confirms the Intended, Broad Scope of Protection

By the 1960s, the deterioration of the nation's waters was alarmingly evident. Symbolic of their disastrous state was the Cuyahoga River, running through Cleveland, Ohio into Lake Erie. It carried so much industrial waste in the 1950s and 1960s that it caught fire on more than one occasion. Lake Erie itself contained enough municipal and industrial waste and agricultural runoff that it supported algae blooms forty miles long and was near becoming biologically dead. Spills off the coast of California blanketed hundreds of miles of coastline with oil. Waterways in many cities across the country were sewage receptacles for industrial and municipal waste. The rate of wetlands loss was approximately 450,000 acres per year.[53] Leaving the problem to individual states and piecemeal federal law to resolve was clearly not working.

Public outcry demanded a strong response. There was a general – and accurate – perception that past approaches relying on state-by-state water quality standards alone was not cleaning up the waters and, indeed, waters were deteriorating. There was a need for a broader federal role to address water pollution.

And Congress responded. The 1972 Act was hailed as the first truly comprehensive federal water pollution legislation. Congressman Blatnik, Chairman of the House Public Works Committee, characterized it as a "landmark in the history of

[48] *Id.*, Appendix D, Literature Review at 13-14.
[49] *See e.g.*, Chesapeake 2000 Agreement, Water Quality Protection and Restoration, at 5
[50] *See* Letter of Jan 9, 2006 from Benjamin Grumbles, Assistant Administrator of EPA.
[51] See attached, "Table 1: State by State NHD Analyses of Stream Categories and Drinking Water Data" (prepared by U.S. EPA).
[52] See attached, " State by State Analyses of Individual NPDES Permits on NHD Intermittent/Ephemeral and "Start Reach" Streams That Have Location Data in PCS" (prepared by U.S. EPA).
[53] Frayer et.al. "Status and Trends of Wetlands and Deepwater Habitats in the Conterminous United States, 1950s to 1970s," USFWS National Wetlands Inventory (April 1983).

environmental legislation."[54] Senator Randolph, Chairman of the Senate Committee on Public Works, said "[i]t is perhaps the most comprehensive legislation that the Congress of the United States has ever developed in this particular field of the environment." [55]

The law's comprehensive nature was a response to the failure of existing water pollution laws. As Senator Edmund Muskie told the Senate when introducing the bill that was to become the new Clean Water Act: "The committee on Public Works, after 2 years of study of the Federal water pollution control program, concludes that the national effort to abate and control water pollution is inadequate in every vital aspect."[56]

It is clear that the intent of Congress when passing the Clean Water Act was to embrace the broadest possible definition of "navigable waters" when it defined that term as "all waters of the United States." The very first sentence of the 1972 statute states, "The objective of this chapter is to restore and maintain the chemical, physical, and biological integrity of the Nation's waters."[57, 58] To achieve this objective, Congress adopted a general prohibition on discharging pollutants from point sources into "navigable waters" without a permit[59], and gave the fullest effect to this and other provisions of the law by defining that term as "waters of the United States."[60]

Both the House and Senate versions of the bills to amend the Federal Water Pollution Control Act (FWPCA) were written to expand federal authority to control and ultimately eliminate discharges of water pollution across the country.[61] Both the House and Senate sought to restructure the nation's federal authority to control water pollution while drawing upon much of the language of earlier versions of the FWPCA as well as the Rivers and Harbors Act (RHA). Thus, in their respective bills, both bodies initially borrowed the term "navigable waters" from the RHA, and included a definition that itself used the term "navigable."[62]

However, in the reports discussing their respective versions of the legislation, both the House and Senate expressed concern about potential narrow interpretations of what waters they intended the Act to cover. The House Public Works Committee stated its concern as follows:

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[54] Legislative History of the Water Pollution Control Act Amendments of 1972, Ser. No. 93-1 (1973).
[55] *Id.*
[56] 117 Cong. Rec. 17397 (daily ed. Nov. 2, 1971).
[57] 33 U.S.C. § 1251.
[58] The House report explains "The word 'integrity'… is intended to convey a concept that refers to a condition in which the natural structure and function of ecosystems is maintained." H.R. Rep. No. 92-911 at 76-77 (1972). Similarly, the Senate report stated, "Maintenance of such integrity requires that any changes in the environment resulting in a physical, chemical or biological change in a pristine waterbody be of a temporary nature, such that by natural processes, within a few hours, days or weeks, the aquatic ecosystem will return to a state functionally identical to the original." 1972 U.S.C.C.A.N. at 3742.
[59] 33 U.S.C. §1311(a)
[60] 33 U.S.C. § 1362(7).
[61] H.R. 11896, 92nd Cong. (1971); S. 2770 92nd Cong (1971).
[62] In the Senate, the definition read "the term navigable waters means the navigable waters of the United States, portions thereof, and the tributaries thereof, including the territorial seas and the Great Lakes. S. 2770, 92nd Cong. § 502(h) (1971). The House bill's definition read, "The term 'navigable waters' means the navigable waters of the United States, including the territorial seas." H.R. 11896, 92nd Cong. 502(8)(1971).

> "The Committee is reluctant to define the term 'navigable waters.' This is based on the fear that any interpretation would be read narrowly. This is not the Committee's intent. The Committee fully intends the term 'navigable waters' be given the broadest possible constitutional interpretation unencumbered by agency determinations which have been made or may be made for administrative purposes."[63]

The Senate Committee on Public Works stated:

> "Through a narrow interpretation of the definition of interstate waters the implementation of 1965 Act was severely limited. Water moves in hydrologic cycles and it is essential that discharges of pollutants be controlled at the source."[64]

While the House report focused upon the need for a broad constitutional interpretation of the Act's scope, and the Senate report spoke to the scientific reality of the interconnected nature of waters, both bodies signaled their desire not to constrain the reach of the Act to those waters previously protected primarily on the grounds of navigability.

When the House and Senate met in conference committee, they took an additional step to ensure that the definition of "navigable waters" did not result in unduly narrow interpretations. As discussed in the report of the conference committee, the House version of the definition was accepted into the final bill, but the word "navigable" was deleted from the definition. Thus, the new definition read, "[t]he term 'navigable waters' means waters of the United States, including the territorial seas."[65]

The Conference report spoke to this change, using the exact terminology of the earlier House Public Works Committee report in confirming that the term "must be given the broadest constitutional interpretation," and expressing that the interpretation of this definition must be "unencumbered by agency determinations which have been made or may be made for administrative purposes."[66]

Finally, the debate in Congress on final passage of the Act confirmed the conference report's intent to give the law broad scope. For example, Congressman John Dingell Jr. explained the definition in his statement to the House on the conference committee bill:

> "The conference bill defines the term "navigable waters" broadly for water quality purposes. It means all "the waters of the United States" in a geographical

[63] H.R. Rep. No. 92-911 at 76-77 (1972).
[64] S. Rep No. 92-414, 92nd Cong. 77 (1971).
[65] S. Rep. No. 92-1236, 92nd Cong.144 (1971).
[66] Id.

> sense. It does not mean "navigable waters of the United States" in the technical sense as we sometimes see in some laws."[67]

After reviewing the broad extent of the Commerce Clause authority, Representative Dingell went on to state:

> Thus, this new definition clearly encompasses all water bodies, including main streams and their tributaries, for water quality purposes. No longer are the old, narrow definitions of navigability, as determined by the Corps of Engineers, going to govern matters covered by this bill. Indeed, the conference report states on page 144: The conferees fully intend that the term navigable waters be given the broadest possible constitutional interpretation unencumbered by agency determinations which have been made or may be made for administrative purposes.[68]

Thus, Congress quite intentionally expanded the Act's jurisdictional scope in 1972 through the Act's new and ambitious pollution reduction goals. Congress chose not to retain the traditional definition of the jurisdictional term "navigable waters" from the Rivers and Harbors Act or limit its jurisdictional reach as in earlier versions of the FWCPA.[69] Instead, Congress deleted the word "navigable" from the "navigable waters" definition of the 1972 Act, thereby asserting federal jurisdiction over all "waters of the United States" as necessary to achieve its stated objective to rid the nation's waters of pollution.

Historically, the law has been construed by the courts to apply to a wide variety of waters. Long before *Rapanos* and *SWANNC*, the Supreme Court recognized that the Act was designed to establish "an all-encompassing program of water pollution regulation," and "applies to all point sources and virtually all bodies of water."[70]

Many of the protections built into the Clean Water Act – including the requirement that point sources discharging pollutants into waters must have a permit – are triggered only when the body of water in question is a "water of the United States."[71] Likewise, the Act's core permit program – the § 402 National Pollutant

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[67] *See* House consideration of the report of the Conference Committee, Oct. 4, 1972, compiled in Legislative History of the Water Pollution Control Act Amendments of 1972, Ser. No. 93-1, 93rd Cong. (1973), at 250-251 (emphasis added).

[68] *Id.*

[69] The definition of "navigable water" in earlier version of the FWCPA had made express reference to "navigability." 211 80 Stat. 1253.

[70] *Intl. Paper Co. v. Ouellette*, 479 U.S. 481, 492 (1987) (emphasis added; internal quotations omitted). *See also U.S. v. Earth Sciences, Inc.*, 599 F.2d 368, 375 (10th Cir. 1979) ("It seems clear Congress intended to regulate discharges made into every creek, stream, river or body of water that in any way may affect interstate commerce"); *NRDC v. Callaway*, 392 F.Supp. 685, 686 (D.D.C. 1975) ("Congress by defining the term 'navigable waters' . . . to mean 'the waters of the United States, including the territorial seas,' asserted federal jurisdiction over the nation's waters to the maximum extent permissible under the Commerce Clause of the Constitution.").

[71] See 33 U.S.C. § 1311(a) (generally prohibiting the "discharge of any pollutant" without compliance with other requirements of the Act); id. § 1362(12) (defining "discharge of a pollutant" to mean "any addition of any pollutant to navigable waters from any point source"); id. § 1362(7) (defining "navigable waters" to mean "the waters of the United States"). .

Discharge Elimination System (NPDES) program – applies to "navigable waters," *i.e.*, to "the waters of the United States."[72] Accordingly, the evolution of § 402 offers highly relevant contextual evidence concerning the proper interpretation of the definition. The § 402 NPDES program was designed to supersede the preexisting permit program under the 1899 Refuse Act. Section 402 provides that permits previously issued under the Refuse Act would thenceforth constitute NPDES permits, and that no further Refuse Act permits would be issued.[73] Tellingly, the 1899 Refuse Act does not merely govern discharge into traditionally navigable waters. To the contrary, it encompasses discharge "into any navigable water of the United States, or into any tributary of any navigable water from which the same shall float or be washed into such navigable water."[74]

Thus, to conclude that non-navigable tributaries of traditionally navigable waters are exempt, one would have to believe that the 1972 Congress cut back the geographic scope of the predecessor statute.[75] The notion that Congress intended any such cutback is untenable. To the contrary, faced with rivers literally catching fire due to pollution,[76] the 1972 Congress concluded that "the previous legislation was 'inadequate in every vital aspect'" – and responded by enacting a "comprehensive" statute whose intent "was clearly to establish an all-encompassing program of water pollution regulation."[77] In direct contradiction to this approach, exclusion of certain non-navigable tributaries would dramatically shrink federal water pollution regulation back to a narrow geographic scope not seen since the McKinley Administration.

The 1977 Amendments to the Act further confirm the inclusive nature of the law's scope. During the deliberations on those amendments, attempts were made to narrow the waters covered by the Act (and by the Refuse Act). Under the proposed narrowing language, the permitting safeguards of those statutes would have encompassed only traditionally navigable waters, together with wetlands that were either "contiguous or adjacent" to such waters and "periodically inundated."[78] Numerous Senators objected to the proposal as a significant weakening of the law and stressed that excising certain waters would undermine the basic structure of the Act; for example, Senator Baker emphasized that

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[72] § 502(7).
[73] 33 U.S.C. §§ 1342(a)(4) & (5).
[74] 33 U.S.C. § 407 (emphasis added).
[75] Indeed, the cutback would be dramatic. See Letter of Jan 9, 2006 from Benjamin Grumbles, Assistant Administrator of EPA, attached as appendix to Brief Amicus Curiae of Assn. of State Wetlands Managers in Rapanos, 2006 WL 139206 (Jan. 13, 2006) (estimating that over half of all U.S. streams are not traditionally navigable); L. Wood, Don't Be Misled: CWA Jurisdiction Extends to All Non-Navigable Tributaries of the Traditional Navigable Waters and to Their Adjacent Wetlands, 34 Envtl. L. Rptr. 10187, 10193 n.32 (2004) (in the Missouri River watershed, there are by conservative estimate 559,669 miles of traditional navigable waters plus tributaries, of which traditional navigable waters represent only 3,151 miles—less than 1%). Even if only a fraction of these tributaries were to be left out of the scope of the Clean Water Act's protections – such as those lacking "relatively permanent flow" or a demonstrable "significant nexus" to traditional navigable waters – the water pollution impacts would be significant.

[76] *see U.S. v. Ashland Oil and Transp. Co.*, 504 F.2d 1317, 1326 (6th Cir. 1974),
[77] *Milwaukee v. Illinois*, 451 U.S. 304, 317-19 (1981).
[78] *See, e.g.*, Legislative History of the Clean Water Act of 1977 (October 1978), at 901.

> "[c]omprehensive jurisdiction is necessary not only to protect the natural environment but also to avoid creating unfair competition. Unless Federal jurisdiction is uniformly implemented for all waters, dischargers located on nonnavigable tributaries upstream from the larger rivers and estuaries would not be required to comply with the same procedural and substantive standards imposed upon their downstream competitors."[79]

However, though such language was passed by the House, the Senate – and ultimately Congress as a whole – rejected it."[80]

The Problem with What Clean Water Act Protections Have Become

Across the country, after both *SWANCC* and *Rapanos*, the agencies have issued policy directives that, if followed, would curtail Clean Water Act protections more than the Court required. As we have noted, the January 2003 EPA and Corps Guidance directed field staff to stop applying Clean Water Act protections to virtually all so-called "isolated" waters without prior permission from agency Headquarters in Washington, D.C. This policy directive far exceeds the scope of the *SWANCC* ruling, effectively denying protection to many waters that still warrant it under existing regulations. This Guidance remains in effect despite a large volume and breadth of critical comments that led the Agency to forego rulemaking, and despite the previously noted 2006 bipartisan U.S. House vote in opposition to the policy reflected in the Guidance.

Last June's new Guidance, which makes matters worse, erroneously indicates that tributary streams which do not flow all year will not be uniformly protected, even though tributaries to various protected water bodies have long been covered by the law, and even though the Supreme Court's decision did not require such a result. Moreover, the agencies have read the Court's ruling too broadly by largely ignoring parts of the decision that would allow the government to protect water bodies when they collectively are important to water quality.

This policy activity has led to a precarious state of affairs when it comes to protecting water bodies from pollution and destructive activity:

- Based on EPA /Corps records, a wide variety of waters have been denied Clean Water Act safeguards in recent years, including a 150-mile-long river in New Mexico, thousands of acres of wetlands in one of Florida's most important watersheds, a 69-mile long canal used as a drinking-water supply in California, and an 86-acre lake in Wisconsin that is a popular fishing spot.
- An estimated 53-59% of America's stream miles outside of Alaska are seasonal waters or headwater streams (or both), representing over 1.8 million river miles. Depending on whose interpretation of current law prevails, many of these

[79] *Id.* at 920.
[80] *U.S. v. Riverside Bayview Homes, Inc.*, 474 U.S. 121, 136-37 (1985).

streams could be at risk of losing protection, or at least be harder to protect in practice.

- These small streams contribute to the public drinking water sources of over 110 million people.
- Based on available geographic information, over 14,000 industrial and municipal facilities have permits that limit their pollution discharges into these streams and rivers. Some opponents of comprehensive Clean Water Act protections have relied on the Court's decisions to argue that they do not need such permits to discharge to these types of waterways.
- EPA and the Corps acknowledge that they have not been enforcing requirements of their Clean Water Act regulations for numerous so-called "isolated" water bodies. There are roughly 20 million acres of "isolated" wetlands in the continental U.S.

The cases below highlight on-the-ground problems with current implementation and demonstrate why CWRA is necessary to restore the longstanding protections originally intended by Congress.

U.S. v Chevron Pipe Line Company

On August 24, 2000, a pipeline operated by the Chevron Oil Pipeline Company failed, spilling 126,000 gallons of oil into an unnamed, west Texas Creek. The creek was dry at the time, as are almost 60 percent of the nations' streams for a portion of the year. Many dry creeks need Clean Water Act protections from oil spills because water will flow through them carrying pollutants downstream into the watershed. In this case, 500 feet from where the oil spill occurred, the unnamed creek runs into Ennis Creek (another intermittent stream), which flows for 17 miles before reaching Rough Creek, which is also intermittent. Almost 30 miles downstream, Rough Creek discharges in to Double Mountain Fork of the Brazos River. Eighty-two miles downstream, it meets the Brazos River, the nearest body of water capable of supporting navigation.

These creeks are not dry all the time. "During times of water flow, there is an unbroken surface water tributary connection from the unnamed tributary, [where the oil spill occurred] …into the Brazos River," according to the Justice Department. For over 30 years, the Clean Water Act protected tributaries like this one and countless other waters from illegal discharges of oil and other pollutants. This protection is essential to meet the basic Clean Water Act goal of restoring and maintaining the chemical, physical and biological integrity of the nation's waters.

Yet in this case, a Federal trial court in Texas ruled that because no water was flowing in the unnamed tributary at the time of the oil spill and the government had not demonstrated that the oil had reached a navigable-in-fact-water, the Clean Water Act did not apply. The District Court issued a decision just days after the *Rapanos* decision leading the Texas judge to conclude that denying protections to these streams was consistent with *Rapanos*.

The *Chevron* decision suggests that a water body many not be protected from oil pollution unless the government can show that it is "navigable" or directly adjacent to such a water. It also indicates that the company responsible for the discharge will not be liable under the Clean Water Act unless the pollution can be demonstrated to have reached a navigable-in-fact water or water body adjacent to such water. Such a demonstration will be time and resource intensive and has never before been required under the Clean Water Act. Yet unless the required "nexus" can be established, oil or waste can be dumped into the creek with virtually no Clean Water Act oversight.

Land O Fewer Lakes

Recently, two large lakes in Minnesota nearly lost their protection against pollution under the Clean Water Act. Although the initial decisions to drop Clean Water Act protections were overturned – one by EPA and Corps headquarters together, one by EPA alone – the cases underscore the threat to the health and safety of Minnesota's waters and waters nationwide as polluters and developers try to shrink the scope of the federal law.

Boyer Lake is a 310-acre lake in Becker County, Minnesota, about 35 miles east of the North Dakota border off of Highway 10. According to Minnesota's Department of Natural Resources (DNR), "northern pike, largemouth bass, walleye and panfish are all popular targets of anglers on this lake," and the DNR stocks the lake with walleye (including over 400,000 walleye fry in 2005). There is a public boat ramp built on the northwest shore and additional boat access from the highway. The DNR website touts that, "Boyer is a relatively scenic lake in prairie country with several small islands, bays, and peninsulas."

Bah Lakes, a 70-acre lake, is located about 75 miles northwest of Minneapolis on the border between Grant and Douglas counties. The lake is usually covered with up to 10-feet of water. Canoeing, as well as bird watching, cross-country skiing, hiking, hunting, and snow shoeing are some of the activities reportedly enjoyed in, on, and around the lake. There is public access to the lake from County Road 19, along which there is room for pullouts and parking. Ducks Unlimited is working to implement a conservation easement to preserve habitat around Bah Lakes. Several hotels, resorts and campgrounds exist in the nearby area.

Despite the use of these waters by boaters, the local Corps office initially concluded that each of these lakes is an "isolated, non jurisdictional water with no substantial connection to interstate (or foreign) commerce." This determination would have removed Clean Water Act protection for these two lakes, meaning that the Act would no longer constrain polluters from discharging into, or even destroying, nearly 400 acres of Minnesota's fresh water lakes.

These misguided determinations were ultimately reversed, keeping Clean Water Act protections in place. Officials in EPA and Corps headquarters overturned one decision, Boyer Lake. In the case of Bah Lakes, however, the Corps would not endorse EPA's ruling that that water was still protected by the Clean Water Act.

The fact that federal officials first concluded that the Clean Water Act did not cover such large and productive bodies of water shows that the threat to so-called "isolated" waters is significant. These examples – particularly the fact that Corps headquarters would not overturn the Bah Lakes determination – indicate that some regulatory officials may misunderstand what the Clean Water Act protects, or simply lack the commitment to implement the law, or both.

Avondale Creek

Avondale Creek is a continuously flowing stream in north Birmingham, Alabama feeding into Village Creek. After 28 miles, Village Creek flows into Bayview Lake, which was created by damming the creek. Locus Fork flows out of the lake for 20 miles before it reaches the Black Warrior River, which is traditionally-navigable-in-fact.

In June of 2005 – after one of the longest environmental crimes trials in history – a jury in Birmingham found McWane, Inc., a pipe manufacturer, and company managers guilty of knowingly discharging oil, lead, zinc and grease into Avondale Creek in violation of the Clean Water Act. The district court sentenced McWane to 60 months' probation and a fine of $5million. The individuals were sentenced to fines ranging from $35,000 to $90,000 and to varying lengths of probation. The convictions stemmed from "systematic discharges of process waste water into a creek and efforts by the company officials to hide these discharges from state and federal regulators," according to the U.S. Department of Justice. The alleged Clean Water Act and other health and safety violations at McWane facilities across the U.S. were so extensive that a PBS Frontline documentary, "A Dangerous Business," featured them.

October 24, 2005 these convictions were overturned on appeal. The ruling stemmed from, what we believe was, a misinterpretation of the *Rapanos* ruling. The McWane defendants challenged their conviction, claiming that the government had not shown that Avondale Creek was protected by the Clean Water Act as interpreted by *Rapanos*. The US Court of Appeals for the Eleventh Circuit ruled that Justice Kennedy's test from *Rapanos* is controlling and requires the government to show a "significant nexus" between a given body of water and a navigable-in-fact one to trigger protections. The court therefore reversed the conviction and remanded the case for a new trial, saying "[t]he government did not present any evidence…about the possible chemical, physical or biological effect that Avondale Creek may have on the Black Warrior River."

For over 30 years, the CWA protected Avondale Creek and countless other waters from pollution. Now, due to *Rapanos*, the Eleventh Circuit says that the government must show evidence of the effects of Avondale Creek on the Black Warrior River to protect the creek, something that will take time and resources never previously required.

The impact of the Supreme Court's split decision in *Rapanos* on this case is telling. The judge who presided over the original McWane trial took himself off the case after the Eleventh Circuit overturned the convictions, saying, "I am so perplexed by the way the law applicable to this case has developed that it would be inappropriate for me to

try it again." The judge went on to say, "I will not compare the [*Rapanos*] 'decision' to making sausage because it would excessively demean sausage makers." In particular, the judge seemed dismayed that no opinion received a majority and that the key terms were left vague. He was further dismayed that the Eleventh Circuit only looked to a singular opinion, Justice Kennedy's, with the result that, "parties, lawyer, and trial judges are charged with determining what one well-positioned Justice might decide."

Confusion and Complexity are Causing Other Problems

What have the changes to Clean Water Act jurisdiction from the Court's decisions and resulting EPA/Corps Guidances meant for the regulatory process? Those tasked with implementing the Clean Water Act are mired in confusing directives that place an increased burden on them. The determination of whether or not a water body is "significantly" connected to a navigable one is now laborious and expensive. It is also sometimes quite speculative, requiring EPA and/or Corps staff to navigate a web of conflicting steps and aids to determine jurisdiction. The examples above illustrate some of the mistakes introduced when jurisdictional determinations are unnecessarily complicated.

In addition to mistakes, the current situation also leads to a dramatic decrease in issuance of permits. In particular, the requirement to treat many jurisdictional determinations on a case-by-case basis can add significant time to permits. Marcus Hall, Director of Public Works in St. Louis County, Minnesota, previously testified before this committee about how the post-*Rapanos* permitting process would "…add anywhere from four to six months to the process, more than doubling the current process time."[81] In this case, the cumbersome permitting process may add $1 to 2 million per year to a $25 to 30 million per year road maintenance budget for the county. It is not only St. Louis County impacted by the slower permitting. Anyone who requires a permit from the Corps, EPA or state agencies related to water quality stands to be affected by the increased burden placed on these regulating agencies.

A Broad Scope of Protection is Needed Because it Affects Numerous Clean Water Act Programs

The Clean Water Act has one definition of "waters of the United States" that is the same for all of the Act's provisions.[82] That definition lays out the scope for many of the Act's provisions: the general prohibition against discharging pollutants into waters without a permit (§ 301); the law's two major permitting programs, the National Pollution

[81] Hall, Marcus J, P.E., Public Works Director/County Engineer, Public Work Department, St. Louis County, Minnesota from testimony before the U.S. House Committee on Transportation and Infrastructure. "Status of the Nation's Waters, including Wetlands, Under the Jurisdiction of the Federal Water Pollution Control Act," held July 17, 2007 in Washington, D.C.

[82] *See, e.g.*, Brief of the U.S. Gov't in *Rapanos* at 21 ("the term 'waters of the United States' "defines the scope of regulatory jurisdiction to be exercised under other provisions of the CWA.").

Discharge Elimination System permits (§ 402) and the dredge and fill permits (§ 404); water quality standards and total maximum daily loads (§ 303); the oil spill liability prevention and liability provisions (§ 311); and more.

In particular, because CWA section 301(a) broadly prohibits the discharge of any "pollutant" to such waters from any "point source" without a permit,[83] the "waters of the United States" are the same, irrespective of whether the pollution is regulated by a permit under the National Pollutant Discharge Elimination (NPDES) program of CWA § 402 or the "dredge-and-fill" program of § 404.[84, 85] For example, in a quest for loopholes, American Petroleum Institute (API) and Marathon Oil Company have mounted a frontal attack on a 2002 Environmental Protection Agency regulation defining which waters are protected by Clean Water Act §311 – the Act's principal safeguard against oil spills. The statutory term "navigable waters" and its definition as "waters of the United States" govern the scope of this program as well.[86] This illustrates that the Court rulings in *Rapanos* and *SWANNC* and the EPA/Corps guidance effectively extend well beyond the § 404 permits directly addressed. These rollbacks threaten the heart and soul of the Clean Water Act.

The Clean Water Restoration Act as a Solution

For the past five years the Clean Water Act's jurisdictional scope has been eroded through the backdoor of the judiciary and through the Bush Administration EPA and Corps. While this whittling away of the Act has been ongoing, proponents of clean water have employed a conservative and transparent strategy of reaffirming the original intent of Congress by proposing to clarify the central statutory definition of the Clean Water Act: this is precisely what the Clean Water Restoration Act (CWRA) achieves. Sec. 2 of the Act states clearly this purpose:

> *The purposes of this Act are as follows:*
> *(1) To reaffirm the original intent of Congress in enacting the Federal Water Pollution Control Act Amendments of 1972 (86 Stat. 816) to restore and*

[83] *see* 33 U.S.C. §§ 1311(a), 1362(12),
[84] *See id.* § 1342(a) (providing for NPDES permits for "discharge of any pollutant"), § 1362(12) ("[t]he term 'discharge of a pollutant' . . . means . . . any addition of any pollutant to navigable waters from any point source"), § 1344(a) (providing for permits for "discharge of dredged or fill material into the navigable waters"); *see also* Oral Argument Transcript, *Rapanos v. U.S.*, at 57 (Feb. 21, 2006) (statement of Solicitor General Clement) ("whatever this Court decides for purposes of the 404 jurisdiction, it's necessarily deciding for purposes of the 402 jurisdiction of the EPA.").
[85] At least some of the opponents of the Clean Water Restoration Act even concede that the definition of "waters of the United States" applies to Clean Water Act programs beyond the § 404 dredge and fill permit program. See Waters Advocacy Coalition, *Reasons To Oppose the "Clean Water Restoration Act of 2007," H.R. 2421* (noting that the definition of "waters of the U.S." affects waters subject to water quality standards, effluent limitation guidelines (which are relevant to the Act's § 402 NPDES permit program) and, the setting of Total Maximum Daily Loads (TMDLs)); *see also* Brief of *Amici Curiae* Croplife America et al., *Rapanos v. U.S.*, at 4 (Dec. 2, 2005).
[86] Interestingly – perhaps even comically – in their briefs in this case, API cites to Congressman Dingell's famous floor statement giving broad meaning to the term "navigable waters" to try to claim that the 1972 legislation meant the exact opposite, which is that Congress was primarily concerned with navigability. Congressman Dingell has submitted an amicus brief in that case to dispel them of that argument.

maintain the chemical, physical, and biological integrity of the waters of the United States.

(2) To clearly define the waters of the United States that are subject to the Federal Water Pollution Control Act (33 U.S.C. 1251 et seq.).

(3) To provide protection to the waters of the United States to the fullest extent of the legislative authority of Congress under the Constitution.

CWRA achieves the stated purposes by removing the language whose interpretation has been the basis for the Court's rulings in *SWANNC* and *Rapanos*, 'navigable waters', and replacing it with the term 'waters of the United States.' It then goes on to define 'waters of the United States' as:

> *"…all waters subject to the ebb and flow of the tide, the territorial seas, and all interstate and intrastate waters and their tributaries, including lakes, rivers, streams (including intermittent streams), mudflats, sandflats, wetlands, sloughs, prairie potholes, wet meadows, playa lakes, natural ponds, and all impoundments of the foregoing, to the fullest extent that these waters, or activities affecting these waters, are subject to the legislative power of Congress under the Constitution.'."*

The language defining 'waters of the United States' is taken from rules used by the Corps and EPA to determine jurisdiction for waters under the Clean Water Act in place prior to the *SWANNC* and *Rapanos* decisions.[87]

The Clean Water Restoration Act is necessary to address the problems created by the current combination of uncertain Court rulings and weakening EPA and Corps guidances. First, CWRA restores the jurisdictional coverage of the Clean Water Act to a baseline that previously existed in order to 'restore and maintain the chemical, physical, and biological integrity of the Nation's water'. The baseline jurisdictional scope CWRA returns to are the well-established rules in place at the time of the *SWANNC* ruling. Returning to this baseline will return the Clean Water Act to a place where it is better able to meet the original Congressional intent as well as the stated purpose of the Clean Water Act. Additionally, CWRA removes the opaque language that the EPA and Corps have reinterpreted, replacing it with a clear statement of Congressional intent.

Second, it provides additional clarity as to which waters the Clean Water Act covers and which it does not. This is clarity beyond that of both Supreme Court rulings, particularly those in the split decision of *Rapanos*, and those in the EPA and Corps guidances. The CWRA definition will be familiar to those working with the Clean Water Act, since it comes from previous EPA and Corps rules.[88] CWRA will lessen the complexity and uncertainty introduced to the permitting processes since the *Rapanos* decision. As previously stated, this has caused a marked slow-down in the permitting process, affecting operational capacity of the regulating agencies and introducing new delays and costs into private and public development.

[87] 33 C.F.R 328.3 (a) and 40 C.F.R. 230.3 (s)
[88] 33 C.F.R 328.3 (a) and 40 C.F.R. 230.3 (s)

The third problem that CWRA addresses is the threat to programs important to the stated goals of the Clean Water Act. The Clean Water Act had originally aimed to eliminate pollution from the nation's waters by 1983. This goal has not been achieved, and we continue to suffer from numerous lakes, rivers and streams that do not meet either the fishable or the swimmable goals of the Clean Water Act. We cannot afford to go backwards by reducing the scope of the Clean Water Act's protections when we should be moving forward to achieve its goals. The Clean Water Restoration Act returns protections to waters we know scientifically are critical to restoring and maintaining the chemical, physical and biological integrity of our nation's waters.

The Clean Water Restoration Act eliminates the most immediate threat to Dredge and Fill Permits (§ 404) but also protects other important Clean Water Act programs. By defining more clearly the jurisdictional scope of the Clean Water Act, the CWRA will also fend off jurisdictional challenges to other important sections. This includes the general prohibition against discharging pollutants into waters without a permit (§ 301), the National Pollution Discharge Elimination System permits (§ 402), water quality standards and total maximum daily loads (§ 303), the oil spill liability prevention and liability provisions (§ 311), and more.[89] Defining the waters covered by the Clean Water Act as CWRA does will better allow states to achieve the reductions in direct and indirect discharges necessary to reduce pollutant levels in our impaired waters. For example, the Total Maximum Day Load (TMDL) program[90]requires both that the total capacity for pollutants be set for a body of water as well as the creation of a plan to reduce inputs into the body in order to meet pollutant load threshold. Removal of bodies of water from jurisdictional scope of the Clean Water Act will threaten the ability of agencies to develop implementation plans that meet the requirements of the program.

Congressional action to address the proper jurisdictional scope of the Clean Water Act, through the Clean Water Restoration Act, is also an appropriate step to take in lieu of relying on EPA and Corps rulemaking. Our contention is that the Court's incorrect interpretations of the Act and Congresses' previous intent cannot be overruled by agency regulations. The agencies are bound to base their rulemaking upon the Court opinions. Moreover, the agencies have proven themselves ill equipped to respond effectively to the Courts' confusing opinions. The Guidance issued last year by the Corps and EPA in response to the *Rapanos* decision took nearly a year to release – and it still fails to provide clear answers to the fundamental questions of how to determine many water bodies' status under the Clean Water Act. The *Rapanos* decision laid out a complex array of conditions to determine jurisdiction but leaves opportunity to issue categorical determinations. This would allow some certainty in those cases rather than having to rely on case-by-case analyses. The EPA and Corps draft guidance failed to take advantage of this opportunity, instead opting to take the more burdensome route. Despite the legislative history of the Act and despite the measured reasoning of the Court, the Bush Administration's agencies have reduced blanket protections for important waters of the United States and generated a fog of

[89] *See, e.g.*, Brief of the U.S. Gov't in *Rapanos* at 21 (the term 'waters of the United States' "defines the scope of regulatory jurisdiction to be exercised under other provisions of the CWA.").
[90] § 303

confusion for federal and state regulators, the regulated community and the public. It is necessary at this time for Congress to once again step in and provide certainty and clarity as to what the jurisdictional definitions are for the Clean Water Act.

Concerns About the Clean Water Restoration Act are Unfounded

During the public debate and in conversations we have had concerning the Clean Water Restoration Act a number of concerns have been raised. Some come from people trying to discern the impact of CWRA. Some are based upon different interpretations of language. Unfortunately, many others are motivated more by rhetoric and a desire to cloud and confuse the discussion. We would like to take the opportunity to address some of the most common here.

One of the central arguments put forth is that the definition of 'waters of the United States' in CWRA is too broad, and that it would expand the jurisdiction of the Clean Water Act beyond what it was before the Supreme Court's *SWANNC ruling*. These claims have gone so far as to suggest that the definition would cover any accumulation of water including swimming pools, hot tubs, puddles in your yard and birdbaths. Instead, CWRA relies on previous agency regulations that broadly protected water bodies.[91] The broad scope of this language, which was in practice for over 30 years until SWANCC, did not lead agencies to regulate all wet areas. They recognized that some waters are not generally considered 'waters of the United States'.[92] These unregulated waters include, but are not restricted to, swimming pools, hot tubs, rain puddles and birdbaths. In addition, the Clean Water Act clearly distinguishes between "navigable waters" and "ground waters." If CWRA becomes law, and the term "waters of the United States" replaces "navigable waters" throughout the law, the statute will still distinguish between "waters of the United States" and "ground waters."

Alarm has also been raised that CWRA will amend the Clean Water Act to cover, not to just what waters are covered under the law, but also what "activities" might take place in those waters and adjacent lands. The term "activities" appears in the bill[93] only to help identify the water bodies that Congress intends to protect (just as the existing EPA and Corps rules protect waters when their use or degradation could affect interstate commerce). Furthermore, the Clean Water Act's core permitting programs apply only to activities that result in the discharge of pollutants from specified "point sources" into protected waters, and nothing in the bill changes that long-standing limitation of the Act.

The Clean Water Act as it currently stands offers a wide variety of generous exemptions to what waters regulated under the act. Many have raised concerns that CWRA will eliminate or limit these existing exemptions. Instead, the bill does not change existing limitations in the Clean Water Act and specifically names those portions of the

[91] 33 C.F.R 328.3 (a) and 40 C.F.R. 230.3 (s)
[92] See Final Rule for Regulatory Programs of the Corps of Engineers, 51 Fed. Reg. 41,206, 41,217 (November 13, 1986.
[93] Sec. 4, (3).

Clean Water Act it will not affect. The "Savings Clause"[94] begins by stating that "[n]othing in this Act (including any amendment made by this Act) shall be construed as affecting ..." It then goes on to list the exemptions it will not modify:

(1) Agricultural return flows.

(2) Discharges of stormwater runoff from oil, gas, and mining operations.

(3) Discharges of dredged or fill materials from normal farming, silviculture, and ranching activities.

(4) Discharges of dredged or fill materials for the purpose of maintenance of currently serviceable structures.

(5) Discharges of dredged or fill materials for the purpose of construction or maintenance of farm or stock ponds or irrigation ditches and maintenance of drainage ditches.

(6) Discharges of dredged or fill materials for the purpose of construction of temporary sedimentation basins on construction sites.

(7) Discharges of dredged or fill materials for the purpose of construction or maintenance of farm roads or forest roads or temporary roads for moving mining equipment.

(8) Discharges of dredged or fill materials resulting from activities with respect to which a State has an approved program under section 208(b)(4) of such Act.

Another concern is that CWRA will not stand up to lawsuits questioning its constitutionality. The extent to which Congress can use its Commerce Clause powers to assert Clean Water Act jurisdiction was not questioned by the Court until the SWANNC decision in 2001. Even then, the Court never ruled that Congress cannot broadly protect streams, wetlands and other waters. In fact, the Supreme Court's opinion in *SWANNC* signals that Congress should enact a clear statement of its intention to protect the nation's waters to the full extent of its constitutional power. CWRA does this. CWRA is drafted to make clear that Congress is exercising its Constitutional power to protect waters in the public interest. As the Environmental Law Institute recently concluded, "[a] principled reading of the relevant cases . . . suggests that a comprehensive legislative scheme to protect the entire Nation's waters . . . should be upheld as constitutional." [95]

A common comment from some is that CWRA is a "federal power grab," expanding Clean Water Act protections to intrastate waters that were previously regulated only by states and localities. Not surprisingly, the vast majority of States

[94] Sec. 6

[95] Jay Austin and Bruce Myers, "Anchoring the Clean Water Act: Congress's Constitutional Sources of Power to Protect the Nation's Water," an Environmental Law Institute White Paper, July 2007.

opposed rollbacks of the regulations on which CWRA is based when they were suggested in 2003, and over 30 States urged the Supreme Court last year to uphold broad protections for small streams and their adjacent wetlands. Since its introduction, CWRA already has gained the endorsement of many state officials across the country as well as the Association of State Wetland Managers and the Association of State Floodplain Managers. CWRA does not expand historic protections or interfere with State or local government rights over such issues as water allocation or zoning. Instead, state water protection programs commonly depend on the Clean Water Act, which has provided a nationwide minimum level of pollution control for water bodies – including wholly intrastate waters – since the 1970s. Some state laws also limit whether and how a state can adopt protections stricter than federal law, leaving protections to water quality within many states wholly dependent on the Clean Water Act and other federal regulations.

Beyond that, protection of our nation's waters has always required a cooperative effort between the federal government and state governments. One way this occurs is through delegation of some permitting and regulatory responsibilities to state governments by the EPA. This is the case for the NPDES permits. The EPA delegates to nearly every state responsibility for implementing NPDES permits for pollution discharges into waters within their borders. Reductions in the scope of waters covered under the CWA directly reduce those states' ability to protect their waters through the NPDES program.

States who do have additional programs in place to protect their lakes, rivers, streams and wetlands still depend on a broad Clean Water Act jurisdiction even if they may appear to be able to work on their own. In most cases, the state programs are buttressed by or even depend on the jurisdictional scope of the Clean Water Act. If the baseline provided by the Clean Water Act is lowered, the states are left to fill in the void or run the risk of not meeting their locally accepted water quality goals.

Additionally, the Clean Water Act was originally created as a response to the patchwork of state and federal laws that proved ineffective at protecting water quality in small sub-watersheds to major rivers and lakes to huge systems such as the Chesapeake, Mississippi, Colorado, Columbia, the Everglades, the Great Lakes and countless others. Rolling back the jurisdiction footprint of the Clean Water Act risks a return to a system that is again dependent on a patchwork of state programs. There is no reason to expect that an approach that was previously ineffective will somehow now prove to be adequate to "restore and maintain the chemical, physical and biological integrity of the Nation's waters."

One questionable claim is that the Court's decisions in *SWANNC* and *Rapanos* have increased clarity as to the jurisdictional scope of the Clean Water Act in the face of uncertain and inconsistent agency implementation. Many of the arguments as to the great complexity and uncertainty introduced since the *SWANNC* decision are presented above. However, to summarize, the *SWANNC* decision focused narrowly on an agency approach to regulating some 'isolated' bodies of water that was rarely used. *Rapanos*, on the other hand, was a 4-1-4 split decision that cannot be interpreted as providing additional clarity on the ground. Instead, it offers a variety of different holdings and conditions for determining jurisdictional scope that already have been

and surely will continue to be interpreted in widely disparate ways. Rather than clarity as to whether or not a body is covered, the Court rulings and the attendant confusing guidances in effect, require case-by-case evaluation of many smaller waterbodies. This situation is not only burdensome for regulators and the regulated but it also adds increased uncertainty and cost to development projects.

Many of the folks in Minnesota and across the country are concerned how CWRA will impact agricultural operations, commodity and farm economies, and rural communities. The contention is that CWRA will negatively impact not only the ability for family farms to operate but also property values and operation of larger commodity businesses as well as the rural communities that depend so heavily on agriculture. As stated above, the exemptions already in place for many normal agricultural operations will remain untouched. Additionally, it returns the Clean Water Act to a baseline jurisdictional scope under which we have operated for considerable time. In considering the impact of CWRA, it is also important to consider the costs to rural communities and agriculture of doing nothing. There is a certain undertone that clean water is not good business. Instead, the economies of many rural communities are inescapably tied to the presence of good, clean water. Many rural areas depend on recreational hunters, anglers and birders for tourism that represents a significant portion of their economies. The economic viability of tourism will be directly impacted by the availability of healthy, clean water in their parks and waterfronts. In addition, most small communities do not have the resources available to larger cities and metropolitan areas pay for and to operate new treatment plants or more complex technological approaches to provide clean drinking water to their residents. This puts them to a greater degree at the mercy of the quality of water that arrives at their drinking water sources, no matter whether as groundwater or surface water.

Conclusion

In 1972, David Zwick, former Clean Water Action Executive Director, and Marcy Benstock authored Water Wasteland, laying out in detail the myriad of problems facing our American waterways and communities. This compendium of water issues and analysis of the failure of the then fractured state system of water oversight was used as part of the intellectual framework for writing and passing the Clean Water Act of 1972. At that time, the Farm Bureau and many of the same forces that are now opposing the Clean Water Restoration Act (CWRA) opposed the Clean Water Act. As a price for passage of the law, most agricultural activities and those of the oil and gas industry were left out of the law. Nor was groundwater effectively covered in the law. Those interests opposed setting a minimum set of federal water protections in 1972 and their opposition to CWRA is nothing more than a confirmation of that rigid stand today.

Despite all the hyperbole of CWRA being a vast expansion of federal power over the waters and lands of the United States, what CWRA does in reality is to assert that since the *SWANCC* and *Rapanos* Supreme Court rulings, two EPA and Corps joint Guidances are further degrading the federal water protection floor and seeding confusion, delay and regulatory uncertainty. The first rule of how to get out of a hole is to recognize you are in one and to stop digging. CWRA does not fix the deficiencies of

the Clean Water Act. CWRA does not extend the reach of the Clean Water Act. CWRA does say emphatically that it is time to bring sanity back to our federal approach to the scope of what waters are afforded federal protection and that these waters shall be treated like any other waters under the law. The short history of jurisdictional determinations since *SWANCC* and *Rapanos* and the myriad state and federal court cases since these decisions point to one irrefutable fact – critical waters are losing protection and the functions and values of those waters will be lost forever. It is time to stop digging the hole any deeper and to come back to the level playing field that existed before these court decisions and unwise policy actions. Passing CWRA does not mean that there will be an expansion of protections, only that the programs of the Clean Water Act, such as the direct discharge permitting program and the oil spill and prevention program will once again protect those waters previously protected.

Thank you for your attention to the health of our nation's water resources.